Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EUGENE F. DIAMOND, M.D. and
JASPER F. WILLIAMS, M.D.,

Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,

Appellees,

AND

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,

Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

Reply Brief of Appellants Eugene F. Diamond, M.D. and Jasper F. Williams, M.D.

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ARGUMENT

INTRODUCTION

The fact that Illinois has attempted to regulate abortion does not indicate "defiance of the United States Constitution" or bad faith.[1] Brief of Plaintiffs-Appellees (Pl.App.Br.)

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[1] Proper deference for state legislative enactments requires that laws which are designed to protect the legitimate and compelling interests that this Court recognized in *Roe v. Wade*, 410 U.S. 113 (1973), be presumed to be constitutional unless it is shown that they burden the fundamental rights recognized by this Court. At a minimum, appropriate constitutional analysis demands that the scope of the right be delineated and the extent of the burden on that right, if any, be articulated before a law may be declared unconstitutional.

at 2-5. The lower courts in this case have consistently rejected Appellees' assertion that the legislative intent of this law is unconstitutional and that the challenged provisions are, therefore, unconstitutional. *See, e.g., Charles v. Carey*, 627 F.2d 772, 778-779 (7th Cir. 1980). These courts have honored the express intent of the Illinois legislature to regulate abortion in a constitutional manner:

> It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. . . . It is the further intention of the General Assembly to assure and protect the woman's health and the integrity of the woman's decision whether or not to continue to bear a child, [and] to protect the valid and compelling state interest in the infant and unborn child. . . .

Ill.Rev.Stat. ch. 38, ¶ 81-21 (1983). The challenged provisions further the legitimate purposes for which they were enacted: to protect the woman's decision of whether to use an abortifacient and to protect the viable unborn child in whom the State has a compelling interest. They are not presumptively unconstitutional.

Moreover, not every law which touches upon abortion can be presumed to burden that right. Appellees have failed to satisfy their burden of first establishing that the challenged provisions burden the woman's fundamental right recognized by this Court in *Roe*. Rather, they assume throughout their brief that the challenged provisions burden constitutionally protected rights. They fail, however, to clearly delineate those rights or to establish factually that a "burden" on those rights actually exists. For example, the constitutional right that is protected is a right to choose. There are no facts in the record to indicate that any woman who wishes to use abortifacients would be burdened by being informed that she is using one.[2] Likewise, Appellees do not

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[2]The conclusory statements contained in Appellees' affidavits do not support this claim.

state whether the woman's right to terminate pregnancy includes a right to ensure fetal death. If the right to terminate pregnancy does not include a right to ensure fetal death, then a law which prevents a physician from performing an abortion in a manner that ensures fetal death does not burden any constitutional right.

I. SECTIONS 2(10) AND 11(d) ARE CONSTITUTIONAL.

Sections 2(10) and 11(d) of the Illinois law are designed to protect the constitutional rights of women to make informed decisions regarding the use of birth control. These provisions require that physicians who administer or prescribe an abortifacient inform their patients that they are doing so.

Appellees claim that §§ 2(10) and 11(d) are unconstitutional for three reasons: 1) they require the transmission of inaccurate information which is contrary to accepted medical practice and thereby influence women against choosing certain birth control measures; 2) they violate the free speech rights of physicians; and 3) they are vague. In addition, Appellees claim that these provisions are preempted by federal statute. These arguments are based upon false premises, and should be rejected by this Court.

A. It Is Medically Accurate To Describe Drugs That Prevent Birth After Fertilization As Abortifacients.

Appellees' first argument is based upon their claim that "[a]ccording to standard medical authorities, conception is not synonymous with fertilization of the ovum," Pl.App.Br. at 17. They insist that conception occurs 6-7 days after fertilization and is synonymous with implantation. *Id.* Thus they contend that §§ 2(10) and 11(d) are unconstitutional because "they require transmission of information that is contrary to accepted medical practice." Pl.App. Br. at 16.

The State of Illinois has retained a definition of conception which is entirely accurate according to traditional and contemporary medical usage and customary usage by the general public. Contrary to Appellees' assertions, the vast

majority of medical authorities equate the terms "fertilization" and "conception."[3] For example, a commonly used medical text states:

> The term conception refers to the union of the male and female pronuclear elements of procreation from which a new living being develops. It is synonymous with the terms fecundation, impregnation and *fertilization*.

Greenhill and Friedman, *Biological Principles and Modern Practice of Obstetrics* 17 (1974) (emphasis added).

Indeed, the very medical authorities cited by Appellees to establish a difference between fertilization and conception use those terms interchangeably. A chart on "Human *preimplantation* stages," in *Williams Obstetrics*, refers to the 2-cell stage which has been "washed from the fallopian tube 1½ days *after conception*." Pritchard, MacDonald & Gant, *Williams Obstetrics* 89 (Fig. 5-7) (17th ed. 1985) (emphasis added). This use of "conception" clearly refers to fertilization, not

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[3] At least seven current medical dictionaries equate these terms. *See, Blakiston's Gould Medical Dictionary* 305 (4th ed. 1979) (conception: "the fertilization of the ovum by the spermatozoon."); *Taber's Cyclopedic Medical Dictionary* 368 (15th ed. 1985) (conception: "2. fertilization"); *Mosby's Medical and Nursing Dictionary* 258 (1983) (conception: "1. the beginning of pregnancy, usually taken to be the instant that a spermatozoon enters an ovum, 2. the act or process of fertilization"); *Butterworth's Medical Dictionary* 400 (2d ed. 1978) (conception: "1. The act of becoming pregnant. 2. The fertilization of the ovum by a spermatozoon and the beginning of the growth of the embryo."); *Melloni's Illustrated Medical Dictionary* 108 (2d ed. 1985) (conception: "2. The fertilization of an ovum or the act of becoming pregnant."); *Urdang Dictionary of Current Medical Terms* 91 (1981) (conception: "1. (in gynecology) the start of pregnancy when a male germ cell (sperm) fertilizes a female germ cell (ovum) in the fallopian tube."); *Black's Medical Dictionary* 217 (33d ed. 1981) ("Conception signifies the complex set of changes which occur in the ovum and in the body of the mother at the beginning of pregnancy. The precise moment of conception is that at which the male element, or spermatozoon, and the female element, or ovum, fuse together.").

implantation. Moreover, *Dorland's* medical dictionary states that conception means "the onset of pregnancy,[4] marked by implantation of the blastocyst; *the formation of the visable* [sic] *zygote.*" *Dorland's Illustrated Medical Dictionary* 296 (26th ed. 1985) (emphasis added). *Dorland's* also states that "[t]he process of fertilization leads to the formation of a zygote and ends with the initiation of its cleavage." *Id.* at 493. Thus, according to *Dorland's*, conception also means fertilization.

Recent redefinition of conception to refer to implantation allows certain drugs and devices which, according to the great weight of medical authority, would be classified as abortifacients, to be reclassified as contraceptives. Such redefinition by some does not require the State to adopt that new definition; rather, it simply highlights the need for §§ 2(10) and 11(d) to eliminate the resulting confusion that is inevitable. Women are entitled to accessible, common sense information in order to be able to choose between methods of birth control which prevent fertilization and those which prevent birth after fertilization has taken place.

Appellees maintain that these provisions undermine informed consent by imposing a "theory of life" on women and attempting to "influence" a woman's choice against birth control. Both claims are groundless. No "theory of life" is espoused by these provisions. As Appellants have established, the definition of abortifacient, and the distinction between abortifacient and contraceptive methods of birth control, is well-supported by competent medical authority. Illinois is merely acknowledging that a large segment of its

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[4] Pregnancy is defined as "the condition of having a developing embryo or fetus in the body, after union of an ovum and spermatozoon. In women duration of pregnancy is about 266 days." *Dorland's* at 1063. "The expected time of birth is roughly calculated as 266 days *after fertilization.*" Moore, *Before We Are Born: Basic Embryology and Birth Defects* 59 (1976) (emphasis added). Thus, pregnancy according to *Dorland's* begins at fertilization. If it began at implantation, the duration of pregnancy would be approximately 6-7 days shorter, or 259-260 days.

population considers this distinction very important. It is entitled to ensure that women are provided this information in order to protect their fundamental right to choose whether or not to use abortifacients. This information does not influence a woman's decision for or against a particular means of birth control in any impermissible way. Women who are opposed to using abortifacients will presumably respond to this information by seeking other, non-abortifacient methods of birth control. Women who are not opposed to using them will use them.

B. No First Amendment Right of Physicians Is Offended by Sections 2(10) and 11(d).

Appellees' claim that these sections infringe upon their First Amendment right is based upon the erroneous assumption that doctors must use the term "fetal death" in describing the effects of the drugs and devices they prescribe for women. Appellees' reading of §§ 2(10) and 11(d), however, consistently has been rejected as contrary to their plain language and the authoritative construction given by those responsible for their enforcement.[5] *See*, Appellants' Opening Brief (App.Br.) at 11-12, 17-19. Since doctors are required only to give medically accurate information to their patients, Appellees' First Amendment claims must be rejected.

The State may surely prevent physicians from administering abortifacients without the knowledge and consent of their patients. To hold otherwise would call into question all malpractice claims based on failure to obtain informed consent as violations of the physician's right not to speak.

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[5] Appellees make much of the fact that Attorney General Hartigan and State's Attorney Daley adopted Appellants' brief, which contained the construction set forth above, rather than submitting briefs of their own. Pl.App.Br. at 24, n.31. However, they cite no authority which supports their suggestion that an independent submission is necessary. The Attorney General and the State's Attorney both adopted the brief and arguments contained therein "as their own." As such, it is as though they had written it themselves.

C. Sections 2(10) And 11(d) Are Not Vague.

Section 2(10) clearly distinguishes between drugs that work prior to fertilization and those that operate after fertilization. Section 11(d) applies only to those drugs which operate after fertilization and it applies only when the physician knows that the drug or device operates after fertilization and it does in fact so operate. A physician who knows that a drug he is about to administer operates after fertilization must inform his patient of that fact. Moreover, he may not be held criminally liable under this provision unless the drug is in fact an abortifacient. Thus, physicians are given fair notice of what the law requires and have a reasonable opportunity to conform their conduct to the law.

Appellees have raised four specific examples of alleged vagueness which were not raised below. First, they claim that it is unknown whether the statute imports a purely subjective standard or imposes a mixed subjective and objective standard. Pl.App.Br. at 25. Section 2(10) defines abortifacient to include only those drugs which are *known* to be abortifacients. It does so in recognition of the fact that there are certain drugs that may be suspected to have an abortifacient effect but have not yet been proven to have such effect. Thus, § 2(10) excludes from coverage drugs which have not been accepted throughout the medical community as abortifacients.[6] Section 11(d) contains two additional layers of protection for the physician. Criminal liability cannot attach unless he (subjectively) knows that it is an abortifacient and it is (objectively) in fact an abortifacient. There is no danger of the unwary being trapped by this law.

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[6] As Appellees themselves admit, Pl.App.Br. at 18, the exact mechanisms of the IUD and stilbestrol are yet unknown. *See also*, J. Lippes, *Nonmedicated IUDs: History, Mechanisms of Action, and Clinical Effectiveness*, Chap. 28, *Fertility Regulation, Psychosomatic Problems, and Human Sexuality*, in 6 Sciarra, ed. Gynecology & Obstetrics 3 (Rev. ed. 1985) ("In spite of 20 years of renewed interest and research on IUDs, an understanding of the mechanism of action in the human female remains elusive."). *Id.* at 3.

Appellees' second argument is that §§ 2(10) and 11(d) are vague because many drugs which are "suspected to increase the chances of spontaneous abortion" may also fall within these sections. Pl.App.Br. at 26. The legislature never intended this law to cover drugs with an incidental abortifacient effect. Rather, this law was intended to include methods of birth regulation whose mode of action is abortifacient.

The third argument raised by Appellees appears to rest on the assumption that the legislature intended the term "person" to include corporate persons and that corporations would be precluded from selling abortifacients under § 11(d). Certainly, the legislature did not intend to place a "total ban" on the sale of such drugs. *See*, Pl.App.Br. at 26. When the General Assembly wishes to regulate corporate persons it explicitly does so. Section 11(c), for example, where corporations were intended to be regulated, states: "Any person, firm, corporation, association, agency, institution, or other legal entity. . . ." Pl.App.Br. at SA-24, Ill.Rev.Stat. ch. 38, ¶ 81-31(c) (1983). The failure to explicitly include corporations in the section immediately following, § 11(d), indicates that the General Assembly did not intend them to be regulated by that provision.

The final vagueness claim is that a physician cannot act in compliance with § 11(d) without violating § 11(4), the prohibition against fraudulent abortions.[7] There is no internal inconsistency between these provisions and a physician need not violate one to comply with the other. A physician who is administering an abortifacient to a patient whom he *knows* is *not* pregnant, certainly would not tell that

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[7]Section 11(4) [formerly § 11(f) Ill.Rev.Stat. ch. 38, ¶ 81-31(f) (1983)] prohibits a physician from *performing* what he represents to be an abortion, when he *knows* that the woman is *not* pregnant. Ill.Rev.Stat. ch. 38, ¶ 81-31(4) (1984 Supp.). Section 11(d), on the other hand, applies to the *administration or prescription* of drugs and devices which will prevent birth after fertilization if the woman becomes pregnant or is known to *be* pregnant.

patient that he is *performing an abortion* upon her. Rather, utilizing the flexibility allowed under § 11(d), he should explain to her that although she is not now pregnant, the drug or device will terminate her pregnancy should she become pregnant in the future.

D. The Issue Of Preemption Is Not Properly Before This Court.

Appellees contend that §§ 2(10) and 11(d) of the Illinois statute are preempted by the 1976 Amendments to the Federal Food, Drug, and Cosmetic Act. 21 U.S.C. §300 (1982). Pl.App.Br. at 21 n.26. This Court has often stated that it will not consider questions which were not "plainly raised" in the complaint nor "specifically passed upon by the lower courts." *Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694, 2699 (1984). None of the factors cited by the Court in *Capital Cities* which allow review of an issue, not set forth in the questions presented, are present here. The issue of preemption was neither raised in the complaint, nor addressed by the district court or court of appeals, and this Court has not ordered the parties to address it. Therefore, it should not be considered by this Court.[8]

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[8] Even if this issue were properly before this Court, it fails on several grounds. First, there is no support in the record for the assumption that §§ 2(10) and 11(d) apply to the IUD or stilbestrol. *See* this brief at 7 n.6.

Second, even if there are drugs and devices which are subject to regulation under both the Medical Device Amendments and the Illinois law, Appellees have failed to establish that this overlap is forbidden by clear Congressional intent, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 103 S.Ct. 1713, 1722 (1983), or by actual conflict between the state and federal law. *Id.* When, as here, a State's exercise of its police power is claimed to be preempted, " 'the assumption [is] that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Section 521 of the Medical Device Amendments, 21 U.S.C. § 360k (1982), preempts only

(footnote continued on next page)

II. SECTION 6(1) IS JUSTIFIED BY THE COMPELLING STATE INTEREST IN THE LIFE AND HEALTH OF VIABLE FETUSES, AND WHEN READ IN CONJUCTION WITH SECTION 6(5), PROTECTS THE LIFE AND HEALTH OF WOMEN UNDERGOING POST-VIABILITY ABORTIONS.[9]

Throughout its abortion decisions, this Court has recognized that the State has a compelling interest in the life and health of the viable fetus. In order to avoid the consequences of the compelling state interest that supports § 6(1), Appellees have asserted two claims against that provision. First, Appellees argue that § 6(1) is vague because it does not specify that the attending physician's determination of viability is controlling. Second, Appellees contend that § 6(1) jeopardizes the health of women undergoing post-viability abortions. Both arguments are predicated upon an erroneous construction of § 6(1), and are without merit.

(footnote continued from preceding page)

those statutes "which relate [ ] to the *safety and effectiveness*" of covered devices. Thus, Congress has regulated the safety and effectiveness of certain drugs and devices, but has expressed no intent of regulating the physician-patient relationship with regard to their mode of action.

Finally, there is no actual conflict between federal and state law. The federal regulations apply to inserts prepared by manufacturers. In order to comply with both the federal and state law, a physician must simply ensure that the federally-mandated information circular, if any, be dispensed along with the drug or device. In addition, if he knows that the drug or device acts after union of the egg and sperm to interrupt a pregnancy, he must inform a patient of this fact. In no way does this prevent the physician from meeting his obligations under federal law. Nor does it "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 104 S.Ct. 615, 621 (1984).

[9] Unamended § 6(1) is discussed here because Appellees' arguments are based on it. Appellants, however, continue to argue that unamended § 6(1) is moot. *See,* App.Br. at 27-29.

The premise of Appellees' vagueness argument is that "Section 6(1) . . . applies to fetuses which are 'known to be viable' by persons other than the attending physician." Pl.App.Br. at 28. The District Court, however, had no difficulty in understanding this section and upheld it. *Charles v. Carey*, 579 F.Supp. 464, 473 (N.D.Ill. 1983). The standard for viability under § 6(1) is a subjective one, and a violation of the standard of care must be knowing and intentional. Contrary to Appellees' contention, the phrase "known to be viable" has one meaning: "known by the attending physician to be viable." *See* § 2(1) and App.Br. at 34-35. Whether applied to the attending physician, or to those assisting during an abortion, a fetus is "known to be viable" only when the attending physician has determined that there is a reasonable likelihood of survival apart from the mother. Appellees' contention that § 6(1) allows the determination of viability by someone other than the attending physician to control is thus unsupported.

Appellees' second argument is that § 6(1) gives inadequate protection to the life and health of women seeking post-viability abortions. Although § 6(1) requires physicians to utilize a method of abortion that is least threatening to fetal life and health, § 6(5) states that this requirement need not be followed when to do so would "increase medical risk to the mother." *See* App.Br. at 30. Appellees argue, however, that § 6(5) does not apply to the selection of abortion methods. Thus, they claim that a doctor may be required to select a method of abortion which increases risk to the mother. However, since he would not be required to *use* that method "during the course of the pregnancy termination" if it increased risk to the mother, the choice of a method of abortion which is less safe for the mother would never have any effect. Certainly the General Assembly did not intend such a meaningless exercise as Appellees' reading would require. Section 6(5) applies to all *measures* undertaken "during the course of a pregnancy termination." This has been presumed throughout this litigation to refer to *all* phases of a

pregnancy termination including the selection of abortion method. No other interpretation of § 6(5) is reasonable.[10]

Appellees also misconstrue the term "medical risk" as it is employed in § 6(5). The fact that this term is not defined in the Illinois abortion law is irrelevant. It has a common sense meaning that is entirely consistent with the construction urged by Appellants: risk to the woman's life or health. *See* App.Br at 36. Appellees dismiss this construction as "mere speculation," Pl.App.Br. at 33, but provide no guidance whatsoever as to how "medical risk" might be differently defined. This Court should not be sidetracked by Appellees' deliberate attempts to confuse the meaning of easily understandable words. Moreover, statutes should be construed in a manner that avoids constitutional challenge. *See*, App.Br. at 35.

The argument that § 6(1) denies women access to proper medical care and advice by requiring that physicians give priority to the unborn child is likewise unsupported in the text. Section 6(1) requires a physician to take account of fetal life and health only where he has made a determination that the fetus is viable. Appellees' entire argument ignores the fact that once this determination has been made, the state interest in fetal life and health becomes compelling.

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[10] The exemption in § 6(5) applies to all of the provisions of § 6, many of which regulate various aspects of late term abortions not limited to the actual performance of the surgery. The exemption in § 6(5), then, must apply to all of these aspects, including the selection of the abortion procedure. Moreover, § 6(5), as amended by H.B. 1399, states:

> Nothing in Section 6 requires a physician to employ a method of abortion which, in the medical judgment of the physician performing the abortion based on the particular facts of the case before him, would increase medical risk to the mother.

Ill.Rev.Stat. ch. 38, ¶ 81-26(5) (1984 Supp.).

The unamended version is no longer on the statute books and the new section clearly applies to the selection of methods of abortion.

To hold, as Appellees argue, that the State may not limit a woman's or physician's discretion in the post-viability abortion decision would be to render that "compelling" interest a legal nullity. In this facial challenge, it is Appellees' burden, as plaintiffs, to establish that § 6(1) impermissibly diminishes the standard of care towards pregnant women. Since there is nothing in the text of §§ 6(1) and 6(5), nor in the record, to support such a conclusion, Appellees have failed to meet this burden. The decision of the Court of Appeals invalidating § 6(1) should be reversed.

III. SECTION 6(4) IS A VALID EXERCISE OF THE COMPELLING STATE INTEREST IN THE LIFE OF THE UNBORN CHILD WHO IS POTENTIALLY ABLE TO SURVIVE OUTSIDE OF THE WOMB.[11]

The State of Illinois, in furtherance of its interest in protecting fetal life to the maximum extent permitted by the decisions of this Court, has enacted § 6(4). This provision applies a standard of care identical to that in § 6(1) when, in the judgment of the physician performing the abortion, there exists a possibility of fetal survival. Like the § 6(1) standard, § 6(4) does not apply when use of the fetal survival method of abortion would increase risk to the mother. *See*, App.Br. at 40-41.

Appellees' argument against § 6(4) is based upon two claims: (1) that § 6(4) "severely restricts abortions prior to viability;" and (2) that § 6(4) interferes with a woman's constitutional right to obtain a safe abortion. Both claims are erroneous.

In *Roe*, this Court held that the State's interest in protecting fetal life becomes compelling when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160. Section 6(4) is parallel to this definition: It applies when there is a "possibility" of "sustained survival of the fetus apart from the body of the

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[11] Unamended § 6(4) is discussed here because Appellees' arguments are based on it. Appellants, however, continue to argue that unamended § 6(4) is moot. *See*, App.Br. at 27-29.

mother with or without artificial support." Since "potential" means existing in possibility, *see* App.Br. at 44, n.27, § 6(4) does not regulate prior to viability as that term is defined in *Roe*. The physicians' good faith determination of viability cannot be second-guessed. As is the case throughout the Illinois abortion law, the determination of viability is left up to the attending physician, and is to be based on the particular facts of the case before him.

Appellees' contention that § 6(4) interferes with a woman's constitutional rights also lacks foundation. Under *Roe*, the Constitution protects a woman's decision whether or not to continue a pregnancy. Section 6(4) merely regulates the choice of method of abortion in order to maximize the fetus' possibility of survival.

Section 6(5) applies with equal force to § 6(4) as it does to § 6(1) and, for the reasons set forth in Section II of this brief, Appellees are wrong in suggesting that § 6(4) requires physicians to give priority to the life and health of the unborn child over that of the mother.

Accordingly, the decision of the Court of Appeals invalidating § 6(4) should be reversed.

IV. THIS APPEAL PRESENTS A JUSTICIABLE CASE OR CONTROVERSY.

It is unclear from Appellees' brief whether they contend that this Court lacks jurisdiction because (1) Appellant should not have been granted intervention, or (2) no case or controversy exists. Pl.App.Br. at 11-14. Each of these arguments, however, is without merit and this Court has jurisdiction to decide this appeal.

Almost six years ago, Appellant was granted intervention as a full party based on his asserted economic and professional interests in this litigation.[12] Intervention was not

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[12] That grant of intervention was entirely appropriate. Federal courts have frequently recognized that when a person or group, including physicians, have economic or professional interests which are protected by the legislation under attack,

(footnote continued on next page)

limited to any specific issues and Appellant was permitted to argue and brief on all issues. Although Appellees could have appealed this grant of intervention, they failed to do so, and the time for appeal has long since passed. Thus, they have waived this issue and this Court should not consider this "late blooming argument." *American National Bank & Trust Co. of Chicago v. Haroco, Inc.*, 105 S.Ct. 3291, 3292 (1985).[13]

In *Flast v. Cohen*, 392 U.S. 83, 95 (1968), the Court stated that the "case or controversy" limitation on the power of the federal courts serves basically two functions: (1) to limit "the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process;" and (2) to "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not

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(footnote continued from preceding page)

those persons may intervene to defend the statute. *See, e.g., New York Public Interest Research Group v. Regents of University of State of New York*, 516 F.2d 350 (2d Cir. 1975).

As a pediatrician, Dr. Diamond treats newborn infants. Infants who survive abortions and are in need of immediate medical care may become his patients. Just as Appellees are asserting the rights of their prospective patients, Appellant may assert the rights of his prospective newborn patients who survive abortion, to be born with as few handicapping conditions as is possible. Thus, Dr. Diamond has a clear interest in defending §§ 6(1) and 6(4). In addition, as a member of the medical profession, he has a professional and economic interest in ensuring that the standards of the profession are maintained—that abortifacients are not administered to patients without their knowledge and consent.

[13] Reconsideration of Appellant's intervention is especially inappropriate under the facts of this case. This Court has held that an intervenor's right to appeal is enhanced, not undermined, by the fact that the governmental or representative party fails to appeal, since such a failure to appeal may indicate inadequate representation. *Bryant v. Yellen*, 447 U.S. 352, 366 (1980).

intrude into areas committed to other branches of government."

The factors which this Court traditionally considers to be determinative of whether a case or controversy exists are satisfied in this appeal. As Justice Brennan stated, "the gist of the question of standing" is whether "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions" is present.[14] *Baker v. Carr*, 369 U.S. 186, 204 (1962).

There is clear concreteness in this dispute. The State of Illinois has enacted a statute which has been challenged on its face. The issues have been litigated for six years and have been "sharpen[ed]" for review by this Court. The adversary nature of the dispute cannot seriously be questioned. Appellants have been a party to this litigation for six years and have aggressively defended the law along with the named state defendants.[15]

Contrary to Appellees' assertions, the state defendants have never "concede[d] [the] unconstitutionality" of the challenged provisions. Pl.App.Br. at 9. Indeed, in a letter filed with the Clerk of this Court on July 15, 1985 the Attorney General's Office reasserted the constitutionality of the challenged provisions stating: "The Illinois Attorney General's interest in this proceeding is identical to that advanced by it in the lower courts and is essentially co-terminous with the position on the issues set forth by the appellants." *See* Appendix to this brief.

The cases cited by Appellees in support of their argument are not on point. *Princeton University v. Schmid*, 455 U.S. 100

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[14] Appellees citations of standing cases dealing with the ability of plaintiffs to initiate lawsuits are not applicable to Appellant who is a defendant in a case which has been ongoing for six years.

[15] Indeed, Appellees have on numerous occasions claimed that Appellants were responsible for much of the defense of these provisions and Judge Kocoras stated that "the State defendants and intervenors played at least equal roles in defending the abortion statute." *Charles v. Daley*, No. 79-C-4541, 79-C-4548, Memo.Op. at 7 (N.D.Ill. April 22, 1985).

(1982) (per curiam), involved a criminal trespass conviction based on a violation of private university regulations. In contrast, this appeal involves a facial challenge to a state statute upon which the State has taken a position on the merits—one that is co-terminous with that of Appellants. The State also stands ready to enforce the challenged provisions if they are upheld.[16] Thus, unlike *Princeton*, a decision of this Court will not be merely advisory. Moreover, since no appeal of the reversal of the criminal conviction was taken in *Princeton*, only the validity of Princeton's private university regulations was on appeal. The Court dismissed that appeal because it was moot. *Id.*

Appellees' reliance on *City of Chicago v. Chicago Rapid Transit Co.*, 284 U.S. 577 (1931), is equally misplaced. This Court dismissed the appeal of the City of Chicago based on the familiar doctrine, set forth in *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394 (1919), that municipal corporations, created by the State and subject to dissolution by the State at any time, have no privileges or immunities under the federal Constitution which they may invoke in opposition to the will of the State. *See*, Bator, Mishkin, Shapiro and Wechsler, *Hart and Wechsler's: The Federal Courts and The Federal System*, 182 (2d ed. 1973).

Intervention was properly granted to Appellants and a case or controversy sufficient to satisfy Article III of the Constitution remains. Therefore, this Court has proper jurisdiction to hear this case.

V. UNAMENDED SECTIONS 6(1) and 6(4) ARE MOOT.

Unamended § 6(4) is clearly moot. That section was enjoined from the day it was enacted unti' the day when it was amended by H.B. 1399. Contrary to Appellees' assertions, Pl.App.Br. at 47 n.60, the General Assembly has never repealed an abortion law and subsequently re-enacted that

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[16] Sections 2(10) and 11(d) would be enforced. However, unamended §§ 6(1) and 6(4) are no longer the law in Illinois and could not be enforced. Sections 6(1) and 6(4), as amended, would be enforced if upheld by this Court. Thus, a decision concerning the unamended provisions would not be advisory.

same provision at a later date.[17] Thus, there is no support whatsoever for Appellees' contention that § 6(4), in its unamended form, will ever be enforced against anyone.

In spite of this fact, Appellees continue to maintain that it is not moot. Pl.App.Br. at 46-48. Their entire argument seems to rest on the claim that the amended version of § 6(4) regulates the same area of abortion as its predecessor. While this argument supports Appellants' claim that the amended version be reviewed, *see* App.Br. at 23-26, it in no way supports Appellees' claim that the old version is not moot.

The remainder of Appellees' arguments concerning unamended §§ 6(1) and 6(4) lack merit and, for the reasons set forth in section II (B) of Appellants' Opening Brief, those sections are moot.

CONCLUSION

For the foregoing reasons, the relief sought in Appellants' Opening Brief, App.Br. at 49, should be granted.

Respectfully submitted,

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October 15, 1985

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[17] Sections 2(10) and 11(d) were not repealed by H.B. 1399. Section 2 of that bill, the repealer section, does not repeal those sections, they were merely renumbered. Pl.App Br. at SA-27, SA-13, SA-25.

APPENDIX

Neil F. Hartigan
Attorney General
State of Illinois
Chicago 60601

July 15, 1985

Mr. Alexander L. Stevas
Clerk of the Court
United States Supreme Court
Supreme Court Building
One First Street, N.E.
Washington, D.C. 20543

Re: Diamond & Williams vs. Charles, et al., and
The Hope Clinic for Women, et al., No. 84-1379

Dear Mr. Stevas:

In the spirit of Rule 10.4 of the Rules of Practice of the Supreme Court of the United States, we would like to inform you for the purpose of advising the Court that the State of Illinois, Office of the Attorney General does have an interest in the above-referenced case. Although not an appellant, the Office of the Attorney General, by virtue of having been a party defendant in the United States District Court and before the United States Court of Appeals for the Seventh Circuit, is a party in the United States Supreme Court and is designated an appellee. The Illinois Attorney General's interest in this proceeding is identical to that advanced by it in the lower courts and is essentially co-terminous with the position on the issues set forth by the appellants.

I trust this statement will suffice for the purpose of complying with the statement of interest envisioned by Rule 10.4.

As noted in the attached Certificate of Service, we have served this notice of our interest on the other parties to this action.

Very truly yours,

/s/
Michael J. Hayes
Director of Advocacy
100 W. Randolph, 12th Floor
Chicago, Illinois 60601
312/917-5133